NO. 33335
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

ALLISON J. RIGGS and
JACK E. RIGGS, M.D.,

Appellants/Plaintiffs,

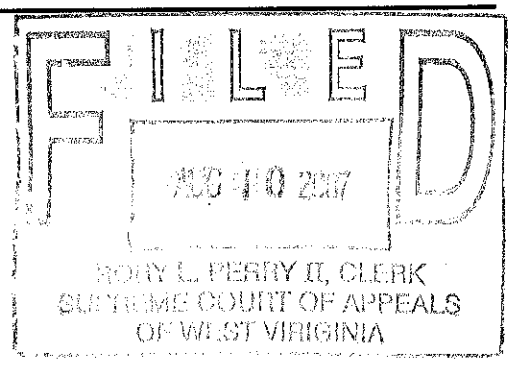
vs.

From the Circuit Court of
Monongalia County, West Virginia
CIVIL ACTION NO. 01-C-147

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Appellee/Defendant.

APPELLANTS' REPLY



Wesley W. Metheney, Esq. (WV State Bar #2538)
WILSON, FRAME, BENNINGER & METHENEY, PLLC
151 Walnut Street
Morgantown, WV 26505
Phone: (304) 292-9429
Facsimile: (304) 292-9427

and

Paul T. Farrell, Jr., Esq. (W. Va. State Bar #7443)
GREENE, KETCHUM, BAILEY, WALKER, FARRELL & TWEEL
419 Eleventh Street
Post Office Box 2389
Huntington, West Virginia 25724-2389
Phone: (304) 525-9115
Facsimile: (304) 529-3284

Counsel for Appellants

COMES NOW the Appellants, ALLISON J. RIGGS and JACK E. RIGGS, M.D., and respectfully submits this *Reply* to the *Brief of the Appellee* as follows:

1. **First, and foremost, a month before trial this case permanently and obviously changed.** Co-defendant WVUBOG settled all the claims against the treating health care providers. WVUH refused to settle the "infection control" claim and unilaterally proffered a stipulation to the Court during the settlement conference. In fact, the settlement conference was necessary, in part, because WVUH insisted on the entry of the stipulation before it would consent to the settlement. WVUH intended the stipulation to serve as the backbone of its primary trial strategy. WVUH purposefully defended this case by distancing itself from the conduct of the treating health care providers.

The anticipatory effect of the stipulation should be apparent to the careful student of the progression of cases originating with Boggs v. Camden-Clark Memorial Hosp. Corp., 216 W.Va. 656, 609 S.E.2d 917 (2004), extending through Gray v. Mena, 218 W. Va. 564, 625 S.E.2d 326 (2005) and ending with the recent case announced in Phillips v. Larry's Drive-In Pharmacy, Inc., __ W. Va. __, __ S.E.2d __ (2007). The stipulated fact is inescapably true. WVUH has argued itself into a pretzel and out of the MPLA.

2. **This is not a "medical professional liability" action.** This case involves a "health care facility." W. Va. Code § 55-7B-2(b) [1986]. This case involves an epidemic of hospital acquired infections. This case involves a "patient." W. Va. Code § 55-7B-2(e) [1986]. However, this case is not a "medical professional liability" action which is defined as "health care services rendered...to a patient." W. Va. Code § 55-7B-2(d). WVUH stipulated and presented evidence at trial that its infection control agents "did not provide medical care or treatment to Allison Riggs." Therefore, the stipulation (and the evidence presented at trial) makes it factually impossible that this is a "medical professional liability" action.

3. **Infection control does not involve "health care services rendered ... to a patient."** This Honorable Court need not announce some new rule to decide the case. We need not "draw a line" regarding the scope of health care nor "hunt for truffles" buried in the record because WVUH has stipulated as follows:

> **In as much as Rashida Khakoo, MD did not provide medical care or treatment to plaintiff Allison Riggs, and inasmuch as Bonny McTaggart, RN did not provide nursing care or treatment to plaintiff Allison Riggs, individual patient care or treatment by agents jointly employed by WVUH and BOG is not at issue in this case.**

See *Order Approving Partial Settlement with University of West Virginia Board of Trustees* at ¶5 (e); August 14, 2006 Hearing Transcript approving the WVUBOG settlement. The evidence presented at trial unequivocally supports this one, stubborn, operative FACT.[1]

Stipulations once made are binding. Groves v. Compton, 167 W.Va. 873, 879, 280 S.E.2d 708, 712 (1981). If the doctrine of judicial estoppel applies to this case, as argued by WVUH (*Brief of the Appellee* at pp. 11-13), it should estop WVUH denying this operative fact.

4. **The issue presented is narrow and rather simple.** The issue can be found buried deep in the *Brief of the Appellee* at page 23 of 33: "[W]hether or nor the infection control services provided by WVUH for and on behalf of all its patients are tantamount to health care services rendered **to** Allison Riggs" (emphasis added by WVUH).

The MPLA noneconomic cap applies to any "medical professional liability action" which is defined, in part, as "health care services rendered [...] to a patient." W. Va. Code § 55-7B-8

---

[1] WVUH lists the job duties of the Infection Control Practitioner in its *Brief of the Appellee* (p.20). None of the job duties include medical care or treatment of patients. At various times during the trial of this matter WVUH argued "there was no care sought or rendered by any ...agent of the hospital" (August 30, 2007 Trial Transcript at p.1); infection control does not "actually treat individuals" (August 22, 2006 Trial Transcript, pp. 143-44) in "any way shape or form" (August 24, 2006 Trial Transcript, p.74-75); "We are not providing direct patient care to her" and "there isn't any evidence that any of these people provided direct care to her." (August 31, 2006 Trial Transcript, Volume 1, p. 87). In fact, the WVUH Nurse Practitioner testified that she had never treated a patient during her 27 year career. (August 24, 2006 Trial Transcript, p.74-75).

and –2(d) [1986]. WVUH stipulates it "did not provide medical care or treatment to Allison Riggs." Therefore, the MPLA noneconomic cap does not apply. It is just that simple.

5. **WVUH argues that the MPLA applies to all "health care" and not merely health care services rendered "to a patient."** (*Brief of the Appellee* at p. 19 and 23).

First, the MPLA noneconomic cap does not state that it applies to "health care." Rather, it expressly states that it applies to any "medical professional liability action" which is in turn defined as "health care services rendered…to a patient." W. Va. Code § 55-7B-2(d). The reason WVUH is attempting to "bait-and-switch" the definition of "health care" and "medical professional liability" is that WVUH has stipulated its infection control agents did not "provide medical care or treatment to plaintiff Allison Riggs." It has no choice but to try and broaden the scope of "medical professional liability" to avoid paying the verdict returned by the Monongalia County jury.

In defining the concept of "medical professional liability," the Legislature employed the phrase "…to a patient." This phrase is not mere surplussage. Ordinarily, when we construe a statute, we give effect to each word employed in a legislative enactment. "It has been a traditional rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning[.]" Osborne v. U.S., 211 W.Va. 667, 673, 567 S.E.2d 677, 683 (2002) (citations omitted). In other words:

> [I]t is presumed the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof, must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective.

Id. (*citing* Mangus v. Ashley, 199 W.Va. 651, 658, 487 S.E.2d 309, 316 (1997) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says

there"); State ex rel. Ballard v. Vest, 136 W.Va. 80, 87, 65 S.E.2d 649, 653 (1951) ("We cannot assume in the absence of wording clearly indicating contrariwise that the Legislature would use words which are unnecessary, and use them in such a way as to obscure, rather than clarify, the purposes which it had in mind in the enactment of the statute."). If the Legislature intended the cap on noneconomic damages to apply to **all** health care services, and not just health care rendered to a patient, then it should have so written.

Second, the maxim *expressio unius est exclusio alterius* means the express mention of one thing implies the exclusion of another. Savilla v. Speedway Superamerica, LLC, __ W. Va. __, 639 S.E.2d 850 (2006). The Legislative decree that the MPLA noneconomic cap applies to health care "rendered ... to patient" implies the exclusion of those claims which do not involve direct patient care. The MPLA simply "does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability." Boggs v. Camden-Clark Memorial Hosp. Corp., 216 W.Va. 656, 609 S.E.2d 917, Syl. Pt 3 (in part) (2004).

Third, WVUH's argument is an apagogical argument or *reducio ad absurdum*. Every act performed at WVUH can arguably be reduced to the absurd conclusion, by seven degrees of separation, that health care services are involved. One could argue that security, valet parking, floor mopping, food services and linen services at the hospital are related to health care services. One could also argue that pharmacy claims and negligent credentialing claims are related to health care. However, health care services must be rendered "to a patient" to invoke the MPLA noneconomic cap.

Your Appellant concedes that WVUH provides "health care." WVUH is a health care facility which employs many health care professionals including nurses. Health care is abundant within this health care facility. However, it is undisputed that the health care professionals in

this case "did not provide medical care or treatment to Allison Riggs." See *Order Approving Partial Settlement with University of West Virginia Board of Trustees* at ¶5 (e).

6. **WVUH goes to great length to establish the Riggs case is a "medical malpractice" or "medical negligence" case.**

This case may very well be a "medical negligence" case. It involves infection control professionals and negligence. However, the issue on appeal is not whether this is a "medical negligence" case. The term "medical negligence" or "medical malpractice" is a generic, epithetic title that has become the colloquial description for or synonymous with a particular class of litigation involving health care providers and patients. Importantly, the term "medical malpractice" is not defined in the MPLA and its invocation does not resolve the penultimate question; whether this is a "medical professional liability" action.

One could call this case medical negligence, professional negligence, hospital negligence, medical malpractice or any other moniker which may generically depict its nature. This case may be a lot of things. One thing it is not is a "medical professional liability" action. That being said, it was acknowledged by all that this case did **NOT** involve direct patient care and it was "an entire[ly] different, unique and probably precedent-setting argument regarding medical malpractice." See August 31, 2006, Trial Transcript, Volume I, p. 101.

Not all medical malpractice cases are governed by the MPLA. WVUH argued during post-trial motions, by way of analogy, that claims against a hospital pharmacist are "clearly medical malpractice." See September 29, 2006, Hearing Transcript at p. 6. Pharmacy cases are not governed by the MPLA. See Phillips v. Larry's Drive-In Pharmacy, Inc., __ W. Va. __, __ S.E.2d __ (2007) (filed June 28, 2007).

The "essence of a medical malpractice action is a physician-patient relationship." See Rand v. Miller, 185 W. Va. 705, 706, 408 S.E.2d 655, 656 (1991). Such a relationship is absent in this case as noted by WVUH counsel during trial when she argued the WVUH Department of

Infection Control "had no idea who Allison Riggs was until this lawsuit was filed. Their job at the hospital does not include when you are talking about infection control actually treating individuals." (August 22, 2006 Trial Transcript, pp. 143-44).

Although the facts of this case may not technically meet the essential elements of a medical malpractice case, it should not matter whether it is or is not a medical malpractice claim. In reality, it is a hybrid between a medical negligence claim and a premises liability claim. We could classify it as one, the other or both. Regardless, the issue is whether it is a "medical professional liability action" as that term is specifically referenced and defined by the MPLA.

7. **WVUH makes a tremendous effort to establish that Appellant originally pled this case as a medical malpractice case "throughout the course of this five (5) year litigation."** (*Brief of the Appellee* at pp. 2,3,4,5,6,7,8,11,12,13,14). They are right.

This case originally included a medical malpractice claim against the treating orthopedic surgeon for the failure to timely diagnose the nosocomial *serratia* infection acquired during the 1995 WVUH *serratia* epidemic. All direct patient care claims were resolved in a settlement with the WVUBOG one month prior to trial. See *Order Approving Partial Settlement with University of West Virginia Board of Trustees*; August 14, 2006 Hearing Transcript approving the WVUBOG settlement.

This fact is recognized again by WVUH during its Rule 50 motion at the close of Plaintiff's case-in-chief:

> WVUH: Given that Dr. Post has been dismissed from the case, **there was no care sought or rendered by any other—any agent of the hospital**, so they haven't proven that any agent of the hospital was ever someone that they sought treatment from.
>
> Paragraph number 15 [of the Complaint], defendants negligently failed to diagnose, detect and or discovery that the complications suffered by Allison Riggs were proximately caused by serratia bacterial infection. Same Motion. It wasn't an agent of the hospital who was in a position to do that.

See August 30, 2006, trial transcript at p. 1 (emphasis added). Everybody understood then, and understands now, that the infection control claims against WVUH do not involve medical care

provided to Allison Riggs. Such individual, "hands on," medical care is simply not within the scope of infection control. The *Complaint* clearly demonstrates this case originated with a direct patient care claim. The evidence presented at trial clearly demonstrates this case did not end with such.

8. **WVUH argues that Appellant is "blatantly disingenuous" for raising the applicability of the MPLA noneconomic cap "for the very first time" after the verdict was entered.** (*Brief of the Appellee* at p.1 and 17). It should be noted that (a) the issue was properly preserved and presented at the trial court level; (b) the facts do not change no matter when the issue is raised; (c) WVUH engineered its own defense; (d) the applicability of the MPLA noneconomic cap was discussed during jury instruction discussions, albeit in a different context (See August 30, 2006, Trial Transcript at p. 126); (e) the MPLA noneconomic cap has no bearing on the elements of proof for liability and/or damages; and (f) the issue became ripe only after the evidence was presented at trial and the verdict was returned.

9. **All the other hyperbolic, bombastic, obfuscating, argumentative and manipulative rhetoric from both sides can be discarded and replaced with thirty-seven (37) pages of the trial transcript.** The discussion regarding jury instructions between the Judge, counsel for WVUH and counsel for Appellant-- in front of a court reporter-- resolves every question about who said what and when. See August 31, 2006 Trial Transcript at pp. 78 -114. It is just that clear.

10. **WVUH argues that the JURY CHARGE included a reference to the "care and treatment" of Allison Riggs.** (*Brief of the Appellee* at p. 27). This is a blatant manipulation of the record. WVUH specifically requested the Judge to strike the phrase "care and treatment" from the Jury Charge. IT WAS THEIR IDEA.

The entire jury instruction discussion is of record. The transcript speaks louder than any rhetoric a fancy lawyer can muster:

MR. FARRELL: But before we get there, let me finish on that last paragraph. There is also a statement a couple of lines down "in the care and treatment of Allison J. Riggs." I think that may be unnecessary in this case because we are not alleging the infection control department actually cared for or treated Allison Riggs.

THE COURT: Right. That's in there a number of places.

MR. FARRELL: Yes.

THE COURT: A number of places. And I certainly stared at that and stared at it and stared because Allison was at the hospital under their care and receiving treatment at the hospital. And I tossed this all around, too. And I thought well, in the general sense she was in the care and treatment of the hospital. Now, not specifically the infection control. It doesn't say that.

MR. FARRELL: Here is my thought on that. You're right. I think that what Chris wants to emphasize is that she was not a patient of Dr. Khakoo's or Bonnie McTaggart's, but I think there was a duty owed by the infection control department to Allison Riggs and that in that context they did owe her a duty of care.

WVUH: Your Honor, if I could make a recommendation.

THE COURT: Sure.

WVUH: I think one of the ways to deal with it is to talk about it in terms of Allison Riggs' hospitalization or when she was hospitalized because that's the duty. The duty is to provide a proper environment while she is there. We are not providing direct patient care to her. The infection control department, their duty has to do with the entire hospital infection control process.

So, when I was going through this I had a concern about the same thing because there isn't any evidence that any of these people provided direct care to her. So, like for example—

THE COURT: Well, you want me to strike "in the care and treatment" and insert "relating to the hospitalization of."

WVUH: Yes. At the time of Allison Riggs' hospitalization.

See August 31, 2006, trial transcript, Volume I at pp. 86-87. The Court then goes on to note the same changes on pages 8 and 9 of the *Jury Charge*. See August 31, 2006, trial transcript, Volume I at pp. 96.

The Court then broke for a closed hearing on another matter and reconvened immediately thereafter reading the *Jury Charge* from his edited draft and notes. The court reporter did not record the actual words read by the Judge. The trial court Judge then handed the edited Jury

Charge to his secretary for typing and entered the same in the record thereafter. See September 29, 2006, Hearing Transcript at p.9 (discussing the origin of the *Jury Charge* document found in the record). Your Appellant submits the *Jury Charge* contains a typographical error to the extent that it references the "care and treatment" of Allison Riggs. For WVUH to argue to the contrary belies the facts, the intention of the parties and the record on appeal.

11. **WVUH argues Appellant's claims are "governed by the MPLA notwithstanding that the alleged breach of the standard of care was not the result of 'hands-on' treatment provided by a particular nurse or physician directly to Allison Riggs."** (*Brief of the Appellee* at p. 22).

With one sentence WVUH defines the debate. The Riggs family argues the MPLA does not apply because WVUH stipulates it did not provide care or treatment to Allison Riggs. WVUH argues the MPLA applies despite the stipulation. Resolution of this question ends this marathon litigation with finality.

While WVUH may argue the language in Phillips regarding "hands-on" and "individual patient care" is mere *obiter dicta* (*Brief of the Appellee* at p. 26-27), the issue still must be resolved. It should be noted that WVUH proffered a pharmacy analogy during post-trial motions which illustrates the fallacy of its argument:

> **WVUH**: [...] If you take it out of the infection control context, if you have a hospital pharmacist, that pharmacist never renders care directly to a patient. But if they mix up the wrong batch of drugs and those drugs are then given to a patient, that's health care services rendered and that's clearly medical malpractice.

See September 29, 2006, Hearing Transcript at p. 6. Of course, the Phillips case was released after WVUH made this argument. Nonetheless, WVUH is just as wrong about its conclusion now as it was then. Pharmacy negligence may be medical malpractice, but it is certainly not governed by the MPLA. The same applies for negligent infection control.

WVUH must marginalize the Phillips *dicta* because it previously conceded it did not provide "hands on" medical care to Allison Riggs.

12. **WVUH argues "had WVUH been properly advised as to the true nature of the claims against it (and the applicable law), it may have presented a different defense, made different arguments and been held to a different standard of conduct."** (*Brief of the Appellee* at p. 32).

It is hard to believe that after five (5) years of litigation and six (6) amended expert witness disclosures that WVUH did not understand the "true nature of the claims against it." It is truly ironic that WVUH now claims it got "sandbagged." See August 31, 2006, Trial Transcript at p. 29.

Nonetheless, the facts of this case are not subject to change. WVUH "did not provide medical care or treatment to plaintiff Allison Riggs." WVUH stipulated to this fact prior to trial. WVUH authored the stipulation. WVUH presented the stipulation to the Court. WVUH wrapped its trial strategy around this one, operative, stipulated fact. WVUH "rolled the dice" and lost and now is backpedaling from its own trial strategy.

WVUH proffered the stipulation and designed its trial strategy around this fact for two reasons. First, it is inescapably true. Second, WVUH intentionally distanced itself from the conduct of the treating health care providers reminding the jury as early as Opening Statement that the WVUH Department of Infection Control "had no idea who Allison Riggs was until this lawsuit was filed. Their job at the hospital does not include when you are talking about infection control actually treating individuals." See August 22, 2006 Trial Transcript, pp. 143-44.[2]

---

[2] The trial strategy may also be inferred from comments made by WVUH counsel immediately before closing argument during a bench discussion of jury instructions: "I have no intention of arguing anything with respect to Dr. Post [the treating orthopedic surgeon and former co-defendant], but there has been testimony from their witnesses that if Dr. Post had cultured the tunnel, it likely would have grown *serratia*, and I think a jury can be saying, well, gosh darn it, why didn't you just go in there and do it." See August 31, 2007 Trial Transcript, Volume I, at p. 92.

Ultimately, is does not matter whether WVUH could, in hindsight, change its defenses or trial strategy. Neither alters the undisputed fact that WVUH "did not provide medical care or treatment to plaintiff Allison Riggs." Try as it might, there is no rule of civil procedure to change the facts. This fact is stubborn and creates significant consequences.

13. **WVUH argues that if the MPLA does not apply, then the jury should have been instructed under a "different, lesser, standard of conduct."** (*Brief of the Appellee* at p. 32). There is no basis in West Virginia jurisprudence to support this statement.

First, your Appellant is not necessarily arguing the MPLA *in toto* does not apply. For instance, the MPLA noneconomic cap applies to any "medical professional liability" action. W. Va. Code § 55-7B-8[1986]. The MPLA "Elements of Proof" applies to claims regarding the "failure of a health care provider to follow the accepted standard of care." W. Va. Code § 55-7B-3[1986]. The former appears to be much narrower than the latter. The issue on appeal only applies to the MPLA noneconomic cap. This Court need not decide the application of the remaining portions of the MPLA ---just W. Va. Code § 55-7B-8[1986] --- as no other issue is germane nor preserved for appeal.

Second, cases involving professional negligence require testimony regarding deviation from the standard of care notwithstanding any statutory obligation. First Nat. Bank of Bluefield v. Crawford, 182 W.Va. 107, 386 S.E.2d 310 (1989) (accounting standard of care depends upon generally accepted accounting practices); Capper v. Gates, 193 W.Va. 9, 15, 454 S.E.2d 54, 60 (1994) ("[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."); Totten v. Adongay, 175 W.Va. 634, 337 S.E.2d 2 (1985) ("It is the general rule that want of professional skill can be proved only by expert witnesses."). In a medical negligence case, negligence is

"determined based upon a violation of the standard of care of the profession." Reynolds v. City Hosp., Inc., 207 W.Va. 101, 108, 529 S.E.2d 341, 348 (2000).

As aptly noted in the *Brief of the Appellee*, at p. 32, in West Virginia, "health care providers are held to a higher standard of care than that of the ordinary prudent person." As noted in a case cited by WVUH:

> Within their areas of expertise, health care providers and other professionals are held to a higher standard of care than that of the ordinary prudent person. In professional malpractice cases, the reasonable man standard is therefore replaced by a standard based upon the usual conduct of other members of the defendant's profession in similar circumstances. In such cases, the plaintiff must present evidence of this accepted professional conduct to enable the jury to determine the applicable standard. The plaintiff must then establish the professional defendant's negligence by demonstrating that his conduct deviated from the standard.
>
> ....
>
> The jury cannot consider whether a medical malpractice defendant has acted negligently until it has determined the standard against which the defendant's conduct is to be measured. There is a difference between the evidence the jury considers in determining the standard and the standard itself. Only a deviation from the standard itself constitutes evidence of negligence. Consequently, the jury ... could not have found that the hospital's violation of its protocols constituted evidence of negligence unless it first found that the protocols were not merely evidence of the applicable standard, but were synonymous with it.

Reynolds v. City Hosp., Inc., 207 W.Va. 101, 108, 529 S.E.2d 341, 348 (2000). The *Jury Charge* and *Verdict Form* very clearly define the theory of liability regarding the negligent failure to "provide a safe and proper hospital environment with respect to infection control" and are accurate statements of West Virginia.

Nothing would have changed if the trial court ruled the MPLA noneconomic cap was inapplicable before the trial. WVUH offered nothing to settle the case beforehand so, presumably, the presence (or lack thereof) of the MPLA noneconomic cap would not have affected the hospital's decision to "roll the dice." The stipulation is still of record. The facts do not change. Nor does the burden of proof for professional negligence by infection control

professionals. Nor the evidence and expert witness testimony presented at trial. Nor, providence permitting, the outcome.

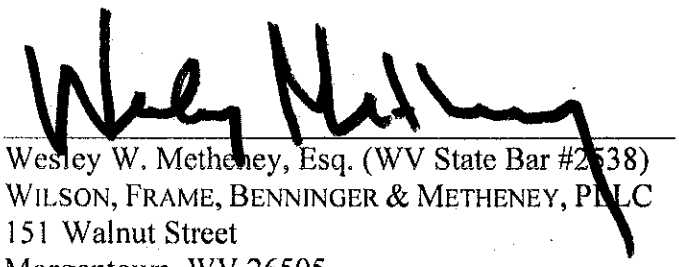
14. **WVUH describes infection control as the *"duty to provide a proper environment."*** See August 31, 2006, Trial Transcript, Volume I at p. 87. Judge Stone described infection control as the duty to "maintain a safe and proper hospital environment." See August 31, 2006, Trial Transcript at p.84. These descriptions are not the result of some eleventh hour fabrication by the Appellant to transform this medical negligence case into a premises liability case to circumvent the MPLA noneconomic cap. These comments are a reflection of the evidence presented at trial.

Moreover, this duty arguably applies not only to patients admitted to its facility but, also, to visitors, employees and the physicians. If the *serratia* epidemic infected 20 nurses, it could hardly be said those claims would be governed by the MPLA noneconomic cap. Such a claim would involve "health care." But it obviously would not involve "health care services rendered...to a patient." WVUH must likewise concede it "did not provide medical care or treatment to plaintiff Allison Riggs."

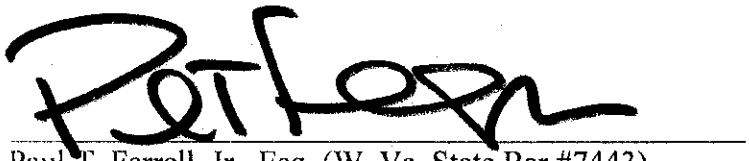
CONCLUSION

The MPLA noneconomic cap applies to claims involving health care services rendered to a patient. WVUH stipulates and concedes its Infection Control Department did not provide medical care or treatment to Allison Riggs. Therefore, the MPLA noneconomic cap does not apply to this case. It is just that simple.

RESPECTFULLY SUBMITTED,
ALLISON J. RIGGS and
JACK E. RIGGS, M.D.,
By Counsel



Wesley W. Metheney, Esq. (WV State Bar #2538)
WILSON, FRAME, BENNINGER & METHENEY, PLLC
151 Walnut Street
Morgantown, WV 26505
Phone: (304) 292-9429
Facsimile: (304) 292-9427



Paul T. Farrell, Jr., Esq. (W. Va. State Bar #7443)
GREENE, KETCHUM, BAILEY, WALKER, FARRELL & TWEEL
419 Eleventh Street
Post Office Box 2389
Huntington, West Virginia 25724-2389
Phone: (304) 525-9115
Facsimile: (304) 529-3284

Counsel for Appellants

CERTIFICATE OF SERVICE

I, Paul T. Farrell, Jr., Esq., do hereby certify that I have filed and forwarded by United States Mail the **"Appellants' Reply"** and served the same upon the following counsel of record by mailing a true copy thereof, by United States mail, postage prepaid on this 9th day of August, 2007:

Christine S. Vaglienti, Esquire
Associate Litigation Counsel
West Virginia University Hospitals, Inc.
P.O. Box 8128
Morgantown, WV 26506-8128
Counsel for Appellee

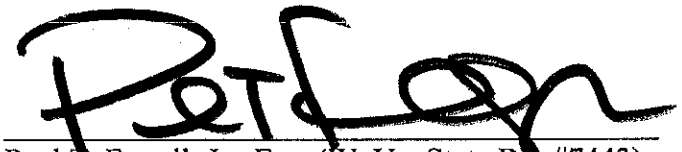
Rita Massie Biser, Esquire
Moore & Biser PLLC
405 Capitol St., Suite 603
Charleston, WV 25301
Counsel for Appellee

Thomas J. Hurney, Jr., Esquire
Jackson Kelly PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322-0553
Counsel for the West Virginia Mutual Insurance Company

Christopher J. Regan, Esquire
Bordas & Bordas, PLLC
1358 National Road
Wheeling, WV 26003
Counsel for West Virginia Association for Justice

Michele Grinberg, Esquire
J. Dustin Dillard, Esquire
Flaherty, Sensabaugh & Bonasso, PLLC
P.O. Box 3843
Charleston, WV 25338
Counsel for West Virginia Hospital Association and West Virginia State Medical Association

An original and nine (9) copies have been filed with the Clerk of the Supreme Court.



Paul T. Farrell, Jr., Esq. (W. Va. State Bar #7443)
GREENE, KETCHUM, BAILEY, WALKER, FARRELL & TWEEL
419 Eleventh Street
Post Office Box 2389
Huntington, West Virginia 25724-2389
Phone: (304) 525-9115
Facsimile: (304) 529-3284